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IN THE

Supreme Court of the United States

October Term, 1962

No. 175

HAROLD ZUCKER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the New York Court of Appeals

BRIEF FOR THE PEOPLE OF THE STATE OF NEW YORK IN OPPOSITION

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Question Presented

Are masochistic and sadistic books and pictures within the preview of obscenity?

Are materials which appeal to the prurient interest of sexual deviates rather than the average person obscene?

What is the nature and degree of proof necessary to establish *scienter* in an obscenity prosecution?

Does browsing in the public portions of a book store constitute a violation of the Fourth Amendment to the United States Constitution?

Statement of the Case.

The record in this appeal of this case is short. It involves the testimony of a single witness and the obscenity exhibits he found on display in the petitioner's book shop. A resume of the testimony and a brief description of the exhibits are necessary to properly evaluate the serious questions posed in the petition.

The Testimony

Detective Edward Flynn testified that on March 9th, 1960 at about 11:30 in the morning he entered a book store called the "Times Square Book Bazaar" which is located at 227 West 42nd Street in New York County (39-40). After going to the rear of the shop and browsing through a number of books which were on display shelves and counters, the officer returned to the front of the shop and questioned the defendant about a particular book (40-7). The defendant, who is the owner and manager of the shop (45), was standing near the cash register (40). He told the police officer that he was familiar with the books in stock and that he did not have the one requested (40-1). After the conversation the detective continued browsing while the defendant made book sales to three customers (41-2). After selecting twenty-one of the articles on display the officer approached the defendant, identified himself and then questioned the defendant about the books (42-3, 46-7, 57). The defendant stated that the books were not pornographic and were for sale at prices ($2 to $5) indicated on the cover (42-5, 55, 85). The police officer then arrested the defendant and seized approximately 1000

sets of photographs which were on display in the store. Thirty-eight of the photos were selected and introduced in evidence on the trial (45, 70-6).

The Exhibits

The exhibits consist of fifteen books, five collections of pages arranged in book form, and thirty-eight photographs. The probative force of the exhibits is two-fold. Any analysis of apparent or visible characteristics of the material is pertinent to a finding of *scienter*. The contents of the exhibits of course are the substance of the crime charged.

The covers

The jackets and backing of most of the material have illustrations which relate to the subject matter of the book. Three of the jackets depict men who are only partially clothed in women's garments (Exhs. 9, 15, 18). The covers on twelve of the exhibits display scenes in which a partially dressed woman is being whipped, beaten, tortured or abused (Exhs. 1, 1A, 2, 3, 5, 6, 8, 12, 14, 16, 17, 19). Also exposed on fourteen of the book jackets are symbols associated with fetishism (Exhs. 1, 1A, 2, 4, 5, 6, 8, 9, 11, 12, 15, 16, 18, 19). In additions to the illustrations, the book jackets also reflect the titles in large print. A few of the more colorful titles are: "Bondage Correspondent" (Exhs. 1 and 1A) "Fifi Chastises Her Maids" (Exh. 2), "The Strange Sisterhood of Mme. Adista" (Exh. 19), "Inquisition at Les Slaves Club" (Exh. 6), "Spanking Fantasies" (Exh. 17), "Cult of Spankers" (Exh. 3), "Males in Bondage" (Exh. 15), and "Boys Will Be Girls" (Exh. 8).

It is further observed that while most of the jackets do not indicate a publisher: a few have been produced in foreign countries (Exhs. 3, 8 and 9) and at least one exhibit (Straps, To Spank or Be Spanked; Exh. 13) is restricted "for subscribers only."

A note on the prices of the material is pertinent. A single exhibit, "Passion Pit," has a price of $3.00 printed on the face. In a majority of the remainder of the exhibits, the prices have been irregularly added to the material, apparently with a rubber stamp. Of interest here is the change of price (from 50¢ to $1.50) of an outdated copy of "Sunshine and Health," the monthly nudist magazine (Exh. 21).

The contents

The contents of this material are not easily categorized. The dominant theme of the matter is obvious. Subordinate themes, however, run across classification lines and indicate that the subject matter has multiple sexual elements interwoven. These elements may roughly be denominated as dealing with transvestism, sado-masochism, fetishism, homosexuality and miscellaneous other sexual aberrations.

Although four exhibits, Exhs. 8, 9, 15 and 18) are primarily concerned with transvestism, numerous heterosexual and homosexual seduction scenes are also elaborately described. Considerable emphasis is placed on such sexual fetishes as button boots, leather gloves, six inch high heeled shoes, tight clothing, and leather bras and corsets.

The second group of exhibits (Exhs. 1, 1A, 2, 5, 6, 16 and 19) is predominantly devoted to depicting pictorially and verbally innumerable scenes in which individuals are being tortured in varied and fantastic ways. In these sado-masochistic scenes, the victims of the many and varied atrocities are usually referred to as being in bondage or slavery. The victims, moreover, although portrayed in agony, experience pleasure. The sexual fetishism apparent in the first group of exhibits is also prevalent here (spike type heels, leather boots, tight clothing, gloves, whips, ropes and belts). The "spanking" exhibits (Exhs. 3, 8, 13, 14 and 17), involve mistreatment of the victims which is slightly less destructive. However, these exhibits all deal in great detail with whippings, beatings and spankings. Some are illustrated with pictures of the various punishments and the devices utilized. Others are more concerned with the incidents of sexual seduction, transvestism and fetishism which are liberally interspersed throughout the sado-masochistic "chastisements."

Another group of exhibits (Exhs. 10, 12 and 22), while depicting female wrestling matches, display partially dressed women clothed in fetish styled attire.

Of the remaining exhibits (Exhs. 11 and 21), "Passion Pit" (Exh. 11) is a publication similar to a comic-book. It combines sexual seductions, whippings, fetishes and lastly, a suggestion of an incestuous, lesbian relationship. Finally, there is a copy of "Sunshine and Health" (dated June 1959) which is a monthly magazine concerned with nudist activities (Exh. 21).

POINT I

The Court of Appeals' resolution of the petitioner's claims was in conformity with the decisions of this Court.

The petitioner alleges that there are three areas of necessary constitutional litigation presented by the instant case. He further maintains that questions in each of these areas—obscenity, scienter and illegal search—are novel and important (petition p. 4).

As to obscenity

Going much further than the standard of obscenity described by this Court in *Roth* v. *United States* [354 U. S. 476], the New York Court of Appeals has recently interpreted the term "obscene" in the strictest possible manner [*People* v. *Richmond County News*, 9 N. Y. 2d 578 (1961)]. In the exceptionally well reasoned *Richmond County News* opinion Judge Fuld notes the following distinction:

> "In the Roth case (354 U. S. 476, supra), the court did say that "Obscene material is material which deals with sex in a manner appealing to prurient interest" (p. 487) and that the test was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest" (p. 489). These statements, however, can only indicate the broad boundaries of any permissible definition of obscenity under the United States Constitution; they do not pretend to, and cannot, give specific content to the meaning of "obscene" as it appears in our statute."

Utilizing *Roth* as a point of departure, the court proceeded to construe the word "obscene" as it exists in Section 1141 of the Penal Law. The court found that only "hard-core" pornography was included in the term obscene. While the concurring opinion of Chief Judge Desmond suggests that the *Roth* test be utilized to evaluate "hard-core" pornography, the opinion of the court sets forth a new and more rigid criterion which has been followed in a later case [see *People v. Finkelstein*, 11 N. Y. 2d. 300 (1962) cert. pending]. The more rigid standard was described as follows:

> "It (hard-core pornography) focuses predominantly upon what is sexually morbid, grossly perverse and bizarre, without any artistic or scientific purpose or justification. Recognizable 'by the insult it offers, invariably, to sex, and to the human spirit' (D. H. Lawrence, Pornography and Obscenity [1930], p. 12), it is to be differentiated from the bawdy and the ribald. Depicting dirt for dirt's sake, the obscene is the vile, rather than the coarse, the blow to sense, not merely to sensibility. It smacks, at times, of fantasy and unreality, of sexual perversion and sickness and represents, according to one thoughtful scholar, 'a debauchery of the sexual faculty'. (Murray, Literature and Censorship, 14 Books on Trial, 393, 394; see, also, Lockhart and McClure, Censorship of Obscenity; The Developing Constitutional Standards, 45 Minn. L. Reb. 5, 65)."

The stricter standard was extensively criticized by the desenting opinion:

> "We find nothing in the First Amendment or in the language of the Roth case (supra) which dictates the

strict construction of section 1141 now proposed by Judge Fuld. By limiting the applicability of that section only to what he termed "hard-core pornography", we would be adopting a far more stringent test than is required under present constitutional standards, and in effect be opening the door to obscenity so widely as to be tantamount to a repeal in large measure of section 1141. Since we may constitutionally give vitality to the legislative enactment, why is it necessary for us to strain against the definition laid down by the highest court in the land in order to permit the continued distribution of material which the average person would unhesitatingly condemn as obscene and lewd?"

Recognizing then that the New York standard is more rigorous than that established by this Court, it necessarily follows that what is obscene by the "hard core" test must be obscene by the *Roth* test.

As to scienter

Of less significance is the petitioner's contention that the nature and degree of the People's proof of *scienter* create critical constitutional issues in this case.

Regardless of what mental element is eventually established as a basic minimum of *scienter*, the evidences in the instant case constituted proof beyond a reasonable doubt of a high degree of awareness of the character of the materials.

In the first place the defendant admitted that he was familiar with the books (40-1). He also stated that if they were obscene he would not carry them (42-5), thereby

implicitly acknowledging that he had considered them from this standpoint. Secondly, the book jackets openly proclaim the material contained. Depicting in practically all cases the fantasy symbols of transvestism, fetishism, and sado-masochistic tortures; these jackets go far beyond those covers found on the "slick" magazines. In addition the titles reflected on these jackets in the main effectively inform the casual eye of underlying filth. Other facts which indicate *scienter* are the exorbitant prices assessed for just a few pages of poorly bound material [Exh. 13 (paper covered, staple bound, 20 pages, for $3.00); Exh. 3 (cardboard covered, staple bound, 32 pages for $5.00); Exh. 14 (paper covered, staple-bound, 46 pages for $3.00)]. Also indicating knowledge are notations on the exhibits announcing that the books are "for subscribers only" (Exh. 13), or "for adult collectors of curiosa" (Exh. 11).

Certainly, when all these elements are evaluated the conclusion that *scienter* has been conclusively established is inescapable.

As to the alleged illegal search

The petitioner's final contention is that the People's evidence is the product of an illegal search and seizure.

The record discloses no illegal search and seizure. First, it is clear that the police officer confined himself initially to material displayed for public sale in a book-store. Such perusal of the seller's wares could hardly be deemed a search. Second the materials seized were seized after and pursuant to a lawful arrest. Since the situation described here is analogous to that in *United States* v. *Rabinowitz*

[339 U. S. 56], this State's courts were justified in rejecting the petitioner's Fourth Amendment claim.

From the foregoing the following conclusions are inescapable. First, the exhibits in this case have been found to be "obscene" under a much higher standard than required by *Roth*. Second, upon this record *scienter* has been established beyond a reasonable doubt. Third, browsing in the public parts of a book-store is not an illegal search. And finally that the previous considerations indicate that the petition in the instant case presents no substantial federal constitutional questions.

Conclusion

The petition for certiorari should be denied.

Respectfully submitted.

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